Melanie M. Blunschi
Direct Dial: 415.395.8129
Melanie.blunschi@lw.com

505 Montgomery Street, Suite 2000
San Francisco, California 94111-6538
Tel: +1.415.391.0600 Fax: +1.415.395.8095
www.lw.com

LATHAM & WATKINS LLP

March 11, 2024

ORAL ARGUMENT SCHEDULED FOR APRIL 5, 2024

Molly C. Dwyer
Clerk of Court
U.S. Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

Re: *Walleye Opportunities Master Fund Ltd. v. Silver Lake Group, L.L.C.* (No. 23-15822)

Dear Ms. Dwyer:

I write on behalf of the BC Partners defendants-appellees in response to the March 5 letter submitted by the plaintiff-appellant. The Eastern District of Michigan's decision in *Shupe v. Rocket Companies, Inc.*, 2024 WL 416377 (E.D. Mich. Feb 5, 2024), is neither controlling nor persuasive.

This non-binding district court decision makes the same mistake as the decision below in this case: The *Shupe* court did not even address the defendant's argument that the plaintiff's and defendant's trades occurred on entirely separate markets, such that there was *no* possibility the plaintiff transacted with the defendant. *See* 2024 WL 416377 at *10. The decision thus fundamentally misunderstood the purposes of the contemporaneous-trading rule. As BC Partners' brief explained (at 57-60), this Court's precedents foreclose use of the contemporaneous-trading rule when, as here, the plaintiff "could not possibly have traded with the insider." *Brody v. Transnt'l Hosps. Corp.*, 280 F.3d 997, 1001 (9th Cir. 2002) (quoting *Neubronner v. Milken*, 6 F.3d 666, 669 (9th Cir. 1993)).

The logic behind those holdings is sound: Because "insider trading does not artificially boost or deflate the market price of a stock aside from typically negligible

supply and demand adjustments," people trading with parties other than the insider are not harmed by any alleged information asymmetry. *In re Seagate Tech. II Sec. Litig.*, 843 F. Supp. 1341, 1369-70 (N.D. Cal. 1994). Plaintiff still has no good answer for this Court's controlling precedent.

The *Shupe* court's holding that the plaintiffs there had Article III standing because Section 20A provides a remedy even when plaintiffs did not "trade directly with defendants" is equally flawed. 2024 WL 416377 at *10. Congress cannot "simply enact an injury into existence." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 426 (2021). But even if Congress *could have* created a remedy here, the fact remains that it *did not*, as this Court's cases clearly establish. Again, Section 20A requires that there be *some* possibility the plaintiff traded with the defendant. *See supra* at 1. Because there is no such possibility here, the contemporaneous-trading rule has no role to play in this case.

Respectfully submitted,

/s/ Melanie M. Blunschi
Melanie M. Blunschi
of LATHAM & WATKINS LLP

Counsel for Defendants-Appellees BC Partners LLP; Serafina S.A.;BC European Capital VIII; BC European Capital-Intelsat Co-Investment; BC European Capital-Intelsat Co-Investment 1; CIE Management II Limited; LMBO Europe SAS; Raymond Svider; and Justin Bateman

cc: Counsel of record via CM/ECF